(1) Supreme Court, U.S.

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No. 00-

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IN THE

Supreme Court of the United States

ROSA M. TOWNSEND,

Petitioner,

vs.

KNIGHT-RIDDER, INC. and
THE MIAMI HERALD PUBLISHING CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED FOR REVIEW

I. Is an employee's good-faith complaint about discrimination protected from retaliation only if she has an "objectively reasonable" belief that terms and conditions of employment she opposes are actually illegal?

II. Does the "remedial" and "humane" enforcement scheme of the Fair Labor Standards Act permit retaliation against a worker who complains in good faith about wage-discrimination, even though it is not "objectively reasonable" to believe that the pay differential is illegal?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case. There is no parent or subsidiary of any party to be listed.

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II. **The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law concerning retaliation for the assertion of federally**

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Appendix A — Opinion of the United States Court of Appeals for the Eleventh Circuit, Dated October 20, 2000 ..... 1a

Appendix B — Opinion of the United States District Court for the Southern District of Florida granting defendants' motion for summary judgment .. 2a

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rosa M. Townsend, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported; it is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the district court is not reported; it is reproduced in the Appendix at 2a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on October 20, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Equal Pay Act and the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. §§ 206(d) and 215(a)(3), respectively, and the anti-discrimination and anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a), respectively, are set forth below:

The applicable provision of the Equal Pay Act, 29 U.S.C. § 206(d), provides as follows:

Prohibition of sex discrimination

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such

> establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. . . .

The anti-retaliation provision of Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), provides as follows:

> **Prohibited acts; prima facie evidence**
>
> (a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person —
>
> > (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;...

The anti-discrimination provision of Title VII, 42

U.S.C. § 2000e-2(a), provides as follows:

> **Unlawful employment practices**
>
> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer —
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

The anti-retaliation provisions of Title VII, 42 U.S.C. § 2000e-3(a), provide as follows:

> **Other unlawful employment practices**
>
> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**
>
> It shall be an unlawful employment practice

for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Plaintiff brought this action pursuant to the Equal Pay Act, 29 U.S.C. § 206(d), the retaliation provision of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), the discrimination and retaliation provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, basing federal jurisdiction on the Fair Labor Standards Act, 29 U.S.C. §§ 216 (b) and 217, Title VII, 42 U.S.C. 2000e-5(f)(3), and 28 U.S.C. § 1331 (federal question).[1]

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[1]A parallel claim under the discrimination and retaliation provisions of the Florida Civil Rights Act of 1992, which is not at issue in this petition, was brought pursuant to the court's supplemental jurisdiction under 28 U.S.C. § 1367. Petitioner does not seek certiorari concerning her discrimination claims.

I. Facts[2]

Rosa M. Guzman, the highest-ranked, highest-paid reporter on the city desk of *el Nuevo Herald*, a Spanish-language insert to *The Miami Herald*, complained to publisher Alberto Ibarqüen that she was neither ranked as highly nor paid as much as Gerardo Reyes, a male reporter. Although Reyes previously had worked at *el Nuevo Herald*, he at the time was assigned to *The Miami Herald*'s Latin American desk. Townsend told Ibarqüen "that I felt that I was being discriminated against because of my work versus his work, versus his salary, and being a woman, he was a man. So there was no other reason, other than the sex."

Townsend complained to Ibarqüen March 13, 1998 following a generally favorable review during which she was given a two-step. 6.5 per cent pay raise, but during which her editors criticized some aspects of her performance and told her that she was not ready to be graded a Reporter 4, as was Reyes.

Ibarqüen became so angry that Townsend feared being fired immediately. Ibarqüen told Townsend at this point, "You first complain[ed] about sexual harassment. Now you're complaining about discrimination. What is next?"[3] Ibarqüen then told Townsend that "he will not

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[2]This recitation of facts is a condensation of the Plaintiff's Response to Defendants' Statement of Undisputed Facts, R-3-93, which cites to the deposition transcripts and other evidentiary materials upon which it relies.

[3]Townsend had complained internally several years earlier, but neither had sued nor had filed a Charge of Discrimination with the Equal Employment Opportunity Commission, concerning (continued...)

tolerate, period, he will not tolerate one more complaint about sexual harassment or discrimination."

Townsend on April 8, two days before going on vacation (until April 24), again asked Ibarqüen if he would reconsider her requests for a reclassification and an attendant pay-raise. After she returned from vacation, Townsend again asked Ibarqüen April 27 if he had reconsidered. Ibarqüen became extremely angry — accusing her of having "brought all sorts of complaints" and once again mentioning her complaints about discrimination and sexual harassment — and told her to get out of his office: "You better go back to the newsroom."

Following this final meeting, Ibarqüen called Townsend's supervisors and told them to terminate her.

Notwithstanding that Townsend's job performance had not deteriorated during the time that she had been objecting to the differences in how she and Reyes were graded and paid, Barbara Gutierrez, editor of *el Nuevo Herald*, and Roberto Fabricio, the managing editor, summoned Townsend to Gutierrez' office on Thursday, April 30 and, in the presence of a human resources representative, gave her a letter that read, in pertinent part:

> You have told both Alberto Ibarqüen and Roberto Fabricio that you cannot and will not accept our decision to retain the Reporter 3 classification of your position and not re-classify

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[3](...continued)
unwelcome sexual advances by an editor. The newspaper investigated and issued the editor a warning.

you as a Reporter 4 as you demanded.... *You also complained this was discriminatory and we have explained that in fact it was not....*

[Y]ou told Robert and Alfredo Casares[, the city editor,] that if the classification stood, you would not tolerate the situation.... When you returned from vacation, you repeated to Alberto Ibarqüen your opposition to the job classification, which he told you would stand....

You have made your objections and your unhappiness evident and appear to be intent in undermining confidence in newsroom leadership. Your behavior is counter-productive and contrary to the best interest of a newsroom that requires teamwork and cooperation.

Rosa, we cannot allow this to continue....

You were told by Alberto that your refusal to accept the classification of your position and to perform as required would be viewed as a resignation and would be accepted. You also said this to Roberto, who acknowledged it and said he, too, would accept it as a resignation. In light of your conduct, the important nature of your job, and your performance, we are accepting your resignation or in the alternative terminating your employment effective May 8, 1998....

(Emphasis added.)

II. Procedural background

Rosa M. Townsend filed suit June 23, 1998 against

The Miami Herald Publishing Co., a corporation, and amended her complaint January 25, 1999 to add as a defendant Knight-Ridder, Inc., which publishes *The Miami Herald* and *el Nuevo Herald* through an unincorporated division known as The Miami Herald Publishing Co. She alleged discrimination under the Equal Pay Act (Count I), Title VII (Count III), and the Florida Civil Rights Act of 1992 (Count V), and retaliation pursuant to the Fair Labor Standards Act (Count II), Title VII (Count IV) and the Florida act (Count VI).

Defendants moved for summary judgment, which the district court granted as to all counts. Not only did the district court find that there were legitimate reasons for ranking Reyes higher than Townsend, and paying him more than her, but it also concluded that her assessment of herself as Reyes' equal was not objectively reasonable given the difference in their assignments, i.e., local vs. Latin America. App. 21a-25a In so holding, however, it noted that "Knight Ridder does not deny that Ms. Townsend's protests were made in good faith." App. 24a.

Following oral argument, a panel of the United States Court of Appeals for the Eleventh Circuit issued a per-curiam affirmance without any opinion. App. 1.

REASONS FOR GRANTING THE WRIT.

I.

The United States Court of Appeals for the Eleventh Circuit entered a decision that conflicts with decisions of the Tenth Circuit concerning the standard to be used in Title VII opposition-clause cases.

The United States Court of Appeals for the Eleventh Circuit requires that any opposition to a perceived unlawful employment practice be — in addition to being made in "good faith" — "objectively reasonable" if it is to enjoy protection under Title VII's anti-retaliation provision. *See Clover v. Total Systems Services, Inc.*, 176 F.3d 1346, 1351 (11thCir. 1999) (plaintiff's statements to internal investigators about older male manager's flirtatious come-ons to young female employee did not qualify for protection because the behavior did not qualify as sexual harassment); *Little v. United Technologies, Carrier Transicold Division*, 103 F.2d 956, 960 (11th Cir. 1997) (plaintiff's reporting of co-worker's racial slur during team meeting did not qualify as protected activity because corporation could not have been held liable for co-worker's behavior). The district court relied upon *Clover* and *Little* in granting defendant's motion for summary judgment. App. B, at 21a-25a.

This standard goes beyond the simple "good faith" standard adopted by the United States Court of Appeals for the Tenth Circuit for the opposition clause. In reversing a summary judgment concerning a former hospital chaplain's informal complaints about what, it turned out, was really not actionable sexual harassment, the court in *Jeffries v. State of Kansas*, 147 F.3d 1220 (10th Cir. 1998) expanded upon a case from the First Circuit[4] that had held that to be protected by the *participation* clause, "there is nothing in the wording of the statute requiring that the charges be valid, not even an implied requirement that they be reasonable." (Citations, brackets and internal quotation marks omitted.) Previously, in *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir.1984), a case in which the cause-and-effect

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[4] *Wyatt v. City of Boston*, 35 F.3d 15, 15 (1st Cir. 1994).

sequence of the complaint and termination was similar to the one at bar,[5] the same court had rejected a defense contention "that Love's good faith belief was not legally sufficient to state a retaliation claim under the opposition clause," 738 F.2d at 385, and held "that a good faith belief is sufficient." *Id.*

While the *Love* court stated that "[e]very circuit that has considered the issue...has concluded that opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been

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[5]The *Love* court recited as follows:

> The claim of retaliatory discharge is based on the following undisputed facts. Love was hired by RE/MAX in February 1978 as director of advertising. She was named vice president for advertising in February 1979, but was not given a raise in pay until April 1979. During this time Love discovered that male vice presidents had received larger starting salaries than she. In December 1979, Love was told that her projects were unacceptably over budget, and that if she went over budget again she would be fired. Love agreed to keep costs down. In March 1980, Love learned that male employees of RE/MAX in positions she believed were comparable to hers had been given substantial raises the previous November although she had not. Love asked the company president, Gail Main, for a performance review and indicated her desire for a pay raise. She was told at the end of March that the company was not happy with her work and that she would not get a raise. On April 18, 1980, Love wrote a memo to the president requesting a raise. She attached a copy of the Equal Pay Act to the memo. Within two hours the chief executive officer of RE/MAX, Dave Liniger, went to her office with the memo and fired her.
>
> 738 F.2d at 385.

violated," *id.*,[6] each of the cases upon which it relied discussed the "good faith" belief in the context of its being "reasonable." The difference between the Tenth Circuit's "good faith" approach and the Eleventh Circuits' "objectively reasonable"[7] standard, however, was highlighted recently in an unpublished opinion[8] in which a panel of the Tenth Circuit reversed a summary judgment based on *Little*, citing *Jeffries* and *Love* and stating that "[t]he district court mischaracterized our standard when it stated that the belief that antidiscrimination law has been violated must not only be subjectively in good faith, but objectively reasonable, citing Eleventh Circuit authority."

The importance in adopting the Tenth Circuit's "good faith" standard, as opposed to the Eleventh Circuit's "objectively reasonable" rule is that while the "good faith" standard would protect employers from "an employee who makes unfounded claims of discrimination in order to excuse non-compliance with legitimate employer

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[6]The *Love* court cited the following cases: *Rucker v. Higher Educational Aids Board*, 669 F.2d 1179, 1182 (7th Cir.1982); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir.1981), *cert. denied*, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1137-40 (5th Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1019 (D.C.Cir.1981); *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir.1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir.1978); and *Mitchell v. Visser*, 529 F.Supp. 1034, 1043 (D.Kan.1981)

[7]*Clover*, 176 F.3d at 1351; *Little*, 103 F.3d at 960.

[8]*Shinwari v. Raytheon Aircraft Co.*, Case No. 98-3324, 2000 WL 731782 (10th Cir. June 8, 2000), *cert. denied*, __ U.S. __, 2001 WL 13219, 69 USLW 3281 (Jan 08, 2001).

demands," *Montiero v. Poole Silver Co.*, 615 F. 4, 8 (1st Cir. 1980) (affirming trial court that rejected employee's complaints as "having been raised as a smokescreen in challenge to the supervisor's legitimate criticism"), it also would be "consistent with a liberal construction of Title VII to implement the Congressional purpose of eliminating discrimination in employment." *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (holding that employee is entitled to opposition-clause protection even when mistaken to the facts about which he complains). The "good faith" approach is consistent with what this Court has stated, in the context of the retaliation provision of the Fair Labor Standards Act (FLSA), is a self-policing enforcement scheme for the American workplace that depends upon "employees [feeling] free to approach officials with their grievances." *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). The imposition of the "objectively reasonable" standard, on the other hand, would require employees suspecting discrimination to bet their very livelihoods that the situation about which they complain actually is illegal — even though they, as did Townsend, complain in subjective good faith. Such a rule effects a social policy contrary to what the Court found in *Mitchell* that Congress had intended. As this Court observed, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved individuals quietly to accept substandard conditions." *Id.* The Tenth Circuit's "good faith" rule effectuates the correct policy.

This Court should resolve the circuit split — and should do so in favor of the Tenth Circuit's "good faith" approach.

II.

The United States Court of Appeals for the Eleventh Circuit has decided an important question of federal law concerning retaliation for the assertion of federally protected rights in the work place in a way that is inconsistent with this Court's interpretation of the Fair Labor Standards Act and Title VII of the Civil Rights Act of 1964.

The Eleventh Circuit's requirement that opposition to unlawful employee practices be "objectively reasonable" if the complaining employee is to enjoy any protection against retaliation — the application of which requirement was fatal to Townsend's claims, notwithstanding that no one disputed that she had made her complaints in subjective good faith — is inconsistent with:

One, the self-policing "climate" that this court recognized in *Mitchell*, 361 U.S. at 336;

Two, the requirement that any worker who feels she is subject to such non-economic discrimination as sexual harassment "avail herself of the employer's preventive or remedial apparatus" prior to taking her claim to court, *see Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); and

Three, especially as it relates to retaliation for having raised an issue pursuant to the Equal Pay Act, which Congress amended onto the FLSA, what this Court has recognized as the "remedial" and "humanitarian" aims of Congress' regulation of the workplace. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597

(1944) (declaring that the FLSA "must not be interpreted in a narrow, grudging manner" and holding that ore miners' on-the-job, below-surface travel time was on the clock for purposes of wage-and-hour computations).

Other courts of appeal have taken a cue from such holdings and have adopted an aggressive enforcement of the FLSA, consistent with what this Court has found to be the underlying congressional purpose of federal workplace legislation.

The FLSA, as well as the National Labor Relations Act, "which was cut out of the same cloth of social legislation as the FLSA in the 1930s and has been used an interpretative aid in analyzing provisions of the FLSA," *Saffels v. Rice*, 40 F.3d 1546, 1549 (8th Cir. 1994), for example, have been interpreted so expansively as to provide anti-retaliation protection even to persons who did not engage in any of their remedies, but only were thought mistakenly by their employers to have done so. *See Saffels* and *Brock v. Richardson*, 812 F.2d 121, 124 (34d Cr. 1987) (mistaken believe that employees had complained about violations of FLSA sufficient to trigger protection of 29 U.S.C. § 215(a)(3)); *Holyoke Visiting Nurses Association v. National Labor Relations Board*, 11 F.3d 302, 307 (1st Cir. 1993) (affirming finding in favor of nurse who was mistakenly thought to be union sympathizer because "proof of an unfair labor practice does not require proof of actual union activity; it is sufficient if the employer was motivated by suspected union activity in discharging the employee").

Likewise, the court in *Goldberg v. Bama Mfg. Corp.*,302 F.2d 152 (5th Cir. 1962) held that a district court abused its discretion by not ordering relief for an incompetent, dishonest employee who "probably ought"

to have been fired for half a dozen reasons, where the firing was motivated in part by the assertion of her statutory rights. 302 F.2d at 153. The court explained as follows:

> [T]he purposes of the Fair Labor Standards Act require that employees throughout the country feel confident that they may bring a complaint to the Department of Labor without being penalized by their employers.... The conspicuous feature of the district court decision which must impress employees is that Bama discharged an employee in violation of the Act and the district court allowed the employer to get away with it scot free. Many employees may not appreciate the extent of Mrs. Powell's misconduct. At least to some degree, therefore, the feeling of confidence in the assertion of statutory rights, so vital to the Act's enforcement, may be shaken. We think that the trial judge exceeded the bounds of sound judicial discretion in denying both reinstatement and reimbursement.

302 F.2d 152, 156 (5th Cir. 1962).

Not to grant certiorari and to reverse the district court and the court of appeals in this case would send to the employees of Knight-Ridder, Inc. at *The Miami Herald* and *el Nuevo Herald*, as well as other workers within the Eleventh Circuit, the message that even if they feel that they were being treated illegally at work, they would be wiser to "decide that matters had best be left as they are." *Mitchell*, 361 U.S. at 293.

CONCLUSION

Based on the authorities cited and the argument presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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